



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-H-C-P-, INC.

DATE: AUG. 10, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a staffing company, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wages of all the beneficiaries of the Forms I-140, Immigrant Petitions for Alien Workers (I-140 petitions), it had filed.

On appeal the Petitioner submits additional documentation and asserts that the evidence establishes its ability to pay the proffered wages of all the beneficiaries of its I-140 petitions (I-140 beneficiaries).

Upon *de novo* review, we will withdraw the Director’s decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with USCIS. Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15. If USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the ETA Form 9089. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date¹ of the petition onward. The priority date in this case is April 17, 2017. The ETA Form 9089 states that the wage offered for the job of registered nurse is \$81,500 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case, there is no evidence that the Beneficiary has been employed by the Petitioner at any time since the priority date. Therefore, the Petitioner cannot establish its ability to pay the proffered wage based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year. However, when a petitioner has filed other I-140 petitions, the Petitioner must establish that its job offer is realistic not only for the instant Beneficiary, but also for the beneficiaries of its

¹ The "priority date" of a petition is ordinarily the date the underlying labor certification application is filed with the DOL. See 8 C.F.R. § 204.5(d). Since this petition is for a Schedule A occupation, the ETA Form 9089 is not certified by the DOL and the priority date of the petition is the date that it along with the uncertified ETA Form 9089 is filed with USCIS.

other petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the every other I-140 beneficiary from this petition's priority date until the other I-140 beneficiaries obtain lawful permanent resident status. See *Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).² Thus, the Petitioner in this case must establish that its net income or net current assets in a given year are sufficient to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries, or the difference between their total proffered wages and the wages paid to them.

On appeal the Petitioner submits a list of 99 I-140 beneficiaries for whom it had filed petitions as of September 18, 2017. The list includes the requested classification, receipt number, priority date, and immigration status of each beneficiary. However, no evidence is provided about the proffered wages of the beneficiaries or the wages paid to any of them. On the current record, therefore, it is not possible to determine the Petitioner's total wage obligations to its I-140 beneficiaries.

The record also includes a copy of the Petitioner's federal income tax return, Form 1120, for the year 2016, which was the most recent filed by the Petitioner at the time of the Director's decision and the subsequent appeal. However, without the Petitioner's 2017 federal tax return (or an annual report or audited financial statement for 2017), we would be unable to assess the Petitioner's ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries from the priority date of April 17, 2017, onward even if evidence of the proffered wages and wages paid to the other I-140 beneficiaries were in the record.

We will remand this matter to the Director, therefore, to request additional evidence about the proffered wages of, and wages paid to, the Petitioner's other I-140 beneficiaries in 2017, and to request regulatory required evidence, as specified in 8 C.F.R. § 204.5(g)(2), of the Petitioner's ability to pay the proffered wages of all its I-140 beneficiaries in 2017.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wages of all its I-140 beneficiaries from the priority date of this petition onward.

² The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

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ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of A-H-C-P-, Inc.* ID# 1596095 (AAO Aug. 10, 2018)